

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMA DIONE BELL,

Defendant-Appellant.

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UNPUBLISHED

October 9, 2007

No. 273403

Wayne Circuit Court

LC No. 2002-186783-FC

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his concurrent sentences of 8 years, 10 months to 50 years imprisonment imposed following his convictions of two counts of criminal sexual conduct in the first degree (CSC I), the victim being under 13 years of age, MCL 750.520b(1)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, the victim testified that on two occasions defendant, who was a friend of the victim's older brother, performed fellatio on him. The jury found defendant guilty as charged. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of 12 to 50 years in prison, with credit for 253 days.

In *People v Bell*, unpublished per curiam opinion of the Court of Appeals, issued November 9, 2004 (Docket No. 248958), another panel of this Court affirmed defendant's convictions and sentences. Our Supreme Court, in lieu of granting defendant's application for leave to appeal, reversed this Court's judgment in part, vacating defendant's sentences, and remanding for resentencing in accordance with *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006), and *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). See *People v Bell*, 475 Mich 878; 715 NW2d 773 (2006).

On remand, the sentencing guidelines recommended a minimum term range of 51 to 106 months. Defendant objected to the scoring of Offense Variable (OV) 10, MCL 777.40, for exploitation of vulnerable victim, at 15 points based on a finding that his actions involved predatory conduct. The trial court determined that OV 10 should be scored at ten points, because defendant exploited the victim's youth. However, the minimum term range did not change as a result of this scoring decision. The trial court sentenced defendant to concurrent terms of 8 years, 10 months (106 months) to 50 years in prison, with credit for 1,490 days.

Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on by the trial court in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A party may not raise on appeal an issue challenging the scoring of the guidelines or the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *Kimble, supra*.

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score; a scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Cf. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), *aff'd* 473 Mich 399 (2005).

Offense Variable 10 is to be scored at ten points if the defendant “exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). The term “exploit” is defined as “to manipulate a victim for selfish or unethical purposes.” MCL 777.40(3)(b). The term “vulnerability” is defined as “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c).

Defendant argues that the trial court abused its discretion by scoring OV 10 at ten points. Defendant acknowledges that complainant was 11 years old at the time the incidents allegedly occurred, but notes that the “mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.” MCL 777.40(2). Defendant observes that had OV 10 been properly scored at zero or five points, the guidelines would have recommended a minimum term range of 42 to 87 months, and concludes that because his minimum terms exceeded the properly scored guidelines, he is entitled to resentencing. We disagree.

Defendant was convicted of two counts of CSC I involving a victim who was 11 years old when the incidents occurred. Both incidents occurred at night when the victim’s mother was at work. The victim testified that he was asleep when the first incident began, and woke to find defendant assaulting him. Defendant told the victim not to tell anyone what had happened, and threatened the victim that he would “do something” if the victim reported his conduct to anyone. Defendant’s conduct toward the victim was certainly selfish and unethical, and thus comports with the definition of “exploit” in MCL 777.40(3)(b). Moreover, the evidence that defendant, an adult, threatened the victim, a child, if the victim reported the conduct supports a finding that defendant intended to act on the victim’s vulnerability. MCL 777.40(3)(c).

The evidence in the record supported the trial court’s scoring of OV 10 at ten points. *Hornsby, supra*. Defendant’s minimum terms fell within the properly scored guidelines; thus, defendant is not entitled to resentencing.

We affirm.

/s/ Richard A. Bandstra  
/s/ Michael J. Talbot  
/s/ Karen M. Fort Hood